

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

9 MARION ANDERSON,) 3:09-cv-00375-HDM-VPC
10 Plaintiff,)
11 vs.) ORDER
12 E.K. McDANIEL, et al.,)
13 Defendants.)

The court has considered the report and recommendation of the
United States Magistrate Judge (#38) filed on March 9, 2011, in
which the magistrate judge recommends that this court enter an
order granting defendants' motion for summary judgment, construed
as an unenumerated Rule 12(b) motion to dismiss for failure to
exhaust administrative remedies. Defendants do not object to the
substance of the report and recommendation but have filed an
objection to a typographical error contained therein. Plaintiff has
not filed any objections, and the time for doing so has expired.

The court has considered the pleadings and memoranda of the parties and other relevant matters of record and has made a review and determination in accordance with the requirements of 28 U.S.C.

§ 636 and applicable case law, and good cause appearing, the court hereby

1 ADOPTS AND ACCEPTS in part and modifies in part the report and
2 recommendation of the United States Magistrate Judge (#38). The
3 defendants' objection is granted. The report and recommendation is
4 amended to strike from page 3 line 2 the year "2009" and to insert
5 in its stead the year "2008." The report and recommendation is
6 adopted in all other respects. It is clear that the plaintiff knew
7 how to utilize the prison's grievance system and that he failed to
8 file any grievance about his claims in this case. Accordingly, the
9 court construes defendants' motion for summary judgment as an
10 unenumerated Rule 12(b) motion to dismiss for failure to exhaust,
11 grants said motion (#26), and hereby DISMISSES WITHOUT PREJUDICE
12 plaintiff's third amended complaint.

13 **IT IS SO ORDERED.**

14 DATED: This 12th day of April, 2011.

15 
16

17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26